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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-454

C. J. PAUL DELOME, *Petitioner*

v.

UNION BARGE LINE COMPANY, *Respondent*

v.

PLATZER SHIPYARD, INC., *Respondent*

REPLY TO PETITION FOR WRIT OF CERTIORARI

To The Supreme Court Of The United States:

Respondent, Platzer Shipyard, Inc., respectfully prays that the Petition for Writ of Certiorari in this matter be in all things denied.

OPINION BELOW

The opinion of the Court of Appeals is included in the addendum to this Reply and is reported at 444 F.2d 225 (5th Cir. 1971).

JURISDICTION

The Trial Court's jurisdiction was invoked by the petitioner's allegations that this was an admiralty or maritime claim within the meaning of Rule 9(h), F.R.C.P. The Court of Appeals reversed and dismissed the case without prejudice for lack of admiralty jurisdiction since the petitioner's injuries neither occurred on navigable waters nor were they caused by a vessel on navigable waters. This Court's jurisdiction may be invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether admiralty or maritime jurisdiction exists in this case where the petitioner's injuries neither occurred on navigable waters nor were they caused by a vessel on navigable waters.
2. Whether Union Barge Line Company owed a duty of seaworthiness to C. J. Paul Delome, i.e., was the vessel in navigation and was Delome performing the traditional duties of a seaman.
3. Whether C. J. Paul Delome has a maritime cause of action for negligence against Union Barge Line Company, since Delome's injury neither occurred on navigable water nor was it caused by a vessel on navigable water, and the barge UPL was in the exclusive custody and control of Platzer Shipyard, Inc.

STATUTES INVOLVED

The only statute involved is the Extension of Admiralty Jurisdiction Act of 1948,[1] providing as follows:

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1. 62 Stat. 496, 46 U.S.C. §740.

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

STATEMENT OF THE CASE

The petitioner, C. J. Paul Delome, was injured on July 25, 1966 while working for Platzer Shipyard, Inc.[2] aboard the barge UBL 550 owned by Union Barge Line Company,[3] which was undergoing repairs at Platzer's shipyard near Houston, Texas. At the time of the accident the open hopper cargo barge was on a marine railway drydock drawn up completely out of the water and entirely over dry land. The petitioner was walking at night along a walkway on the portside of the barge when he tripped and fell into the open barge, thereby sustaining the injuries for which this suit was brought.

After collecting compensation under the U. S. Longshoremen's and Harbor Workers' Compensation Act[4] from the compensation carrier for Platzer, Delome filed suit for damages against Union Barge, alleging that this was a case of admiralty and maritime jurisdiction and an admiralty or maritime claim within the meaning of Rule 9(h).[5] In his claim against Union Barge, Delome alleged that the barge was in navigation and he was doing work traditionally done by seamen, and thus he was protected by the warranty of seaworthiness. In the alternative,

2. Hereinafter called Platzer.

3. Hereinafter called Union Barge.

4. 33 U.S.C.A. §901, et seq.

5. Plaintiff's Complaint, R. 1.

Delome alleged that Union Barge failed to provide him with a safe place to work and was guilty of negligence proximately causing his injuries. Union Barge impleaded Platzer, seeking indemnity or contribution, and alleging that Platzer was negligent or had breached its implied warranty to do its repair work in a workmanlike manner.

On the trial of this case before the Court without a jury, Delome testified that he was working for Platzer on July 25, 1966 as a shipfitter at Green's Bayou, Houston (R. 105) on a UBL barge which was on a marine railway drydock (R. 113); that there was no water underneath the drydock while Delome was working on it (R. 114); that he was instructed by his foreman to climb up a ladder and go to the forward rake of the barge so he could cut a plate to fit underneath the barge (R. 114); that his accident occurred at approximately 10:15 at night (R. 115); that after he got off the ladder he turned to the left and a light from on the shore blinded him and he went ahead and took a few steps and tripped on something and fell inside the open hold of the barge (R. 115); that he did not know what he tripped on (R. 115); that he was on the left side of the barge as he faced the forward rake when he fell (R. 115); that the spotlight was onshore to the left and sort of in front of him (R. 115); that it was about 15 to 20 feet from the ladder to the bow of the barge (R. 166, 252); that the light which blinded him was located onshore on a permanent telephone pole about 15 to 20 feet from Delome (R. 218, 255-256); that the barge was an open hopper dry cargo barge (R. 240); that the barge was not on a floating drydock but was on a marine railway type of drydock, with railway tracks that ran from down in the water upon the shore (R. 240), so that the barge was resting on the railway

tracks and the tracks were resting on land (R. 241); that the barge was on drydock when he went to work that day at 3:30 P.M. (R. 241); that he had been working on the forward part of the barge from the time he got to work at 3:30 P.M. until the time this accident happened at 10:15 P.M. (R. 242); and that there were no Union Barge people there but only members of Platzer shipyard (R. 242-243).

Delome also testified that he was supposed to have been fitting a plate on the rake of this barge (R. 243); that he got the plate from Platzer Shipyard (R. 244); that the plate was not cut to the right size so he had to cut it down with a cutting torch (R. 245); *that the plate was a steel plate and they had to use a winch truck to get the plate up to the barge* (R. 245); *that the steel plate was six to eight feet wide and ten to fifteen feet long and 3/8 inches thick* (R. 246); *that it was heavy enough to use a winch truck to pull it up there* (R. 246); that they used comealongs or a hoist to pick it up to the bottom (R. 246); the winch truck was owned by Platzer Shipyard (R. 246-247); that the knuckle which is rounded, is used to cover where the bottom plate of the rake and the side shell of the barge come together (R. 247, 249); that there were two holes in the barge that the men had been able to get in and out of the rake of the barge—one was the knuckle opening where the knuckle had been removed and the other was the opening where the plate was to be fitted in (R. 251-252); *that with these holes in the bottom of the barge, it would have sunk if it had been in the water* (R. 252).

Vernon Paul Delome, the petitioner's first cousin, testified that he was a fitter with Platzer Shipyard in July 1966 (R. 547); that he was working on the same barge

that the petitioner was working on and observed his accident (R. 548); that there were two holes in the front rake of the barge where you could gain entrance to the rake area (R. 553); that he knew of nobody from Union Barge Line there at the time they were working (R. 560); that the only one telling him how to do his work was Mr. Kirby, who was employed by Platzer Shipyard (R. 560-561); and that all of the work was being done on the front end of the barge (R. 569).

Answers to interrogatories propounded to Union Barge and Platzer were introduced into evidence, and established that the barge was completely removed from navigation during the time of repairs (R. 306) although it was not intended that it be permanently removed from navigation (R. 306); that the dimensions of the barge were 175 feet long, 26 feet wide, and 10.8 feet in depth from the hatch coaming down to the bottom of the hole (R. 306); that the barge UBL 550 arrived at Platzer Shipyard on July 22, 1966 and departed the shipyard seven days later on July 29, 1966 (R. 307); that the amount of charges billed for repair work during these dates on the barge UBL 550 was $3,688.76 (R. 307-308); that there were no representatives, officials or employees of Union Barge Line Company at Platzer Shipyard facilities while the barge was at these facilities for repair work (R. 591-592); and that the barge in question was delivered to Platzer under the custody and control of an independent towing firm (R. 627) and the barge was not manned by an employee of Union Barge.

Ronald Roush, port engineer for Union Barge (R. 593), testified that he was familiar with the construction of the barge UBL 550 (R. 594); that Union Barge had fifteen barges constructed in accordance with the blue-

prints identified as Plaintiff's Exhibit #17 (R. 596, Exhibit Vol. 1); that the UBL 550 was an open barge and not designed to carry a crew or have permanent lights installed on it (R. 598); that it did not have any motor power of its own apart from its tug (R. 599); that these barges are not designed to go to sea but are operated exclusively on inland waterways (R. 601-602); that he had experience with the repair and maintenance of Union Barge's vessels (R. 602); and they did not have anything to do with directing the details of the repair work on these barges (R. 602).

The repair invoice (Plaintiff's Exhibit No. 19) indicated that the repairs made on the barge UBL 550 at Platzer Shipyard in July 1966 included cropping and renewing (cutting out and replacing) the damaged bottom and knuckle in the port side of the bow rake; removing and repairing eight bilge brackets, and removing and entirely replacing one bilge bracket, washing and cleaning mud out of the bow rake and air testing the work when it was completed (Record Appendix Exhibit Volume, p. 2).

Van Wagnon, Platzer's superintendent, testified that Platzer Shipyard was located near Green's Bayou in Houston (R. 630); that he was familiar with the marine railway drydock owned by Platzer Shipyard (R. 630-631); that it runs from the water of a slip off Green's Bayou onto the shipyard premises a distance of 280 feet (R. 631); that the lights on the left side of the railway were located about 30 or 40 feet from the front end of the railway and *280 feet of the railway is out of the water* (R. 635); *that if the front of the barge was pretty nearly even with the light, and if the barge were 175 feet long, then the back end of the barge would be on land* (R. 636);

that the front end of the barge would be 240 feet from the water (R. 636) *and if the barge length were 175 feet, the back end of the barge would be some 65 feet from the water* (R. 636-637); that Plaintiff's Exhibit #19 was a copy of the invoice sent to Union Barge of the repairs to the barge UBL 550 (R. 636); that "crop and renew damaged bottom and knuckle in the bow rake port side" on the invoice means to cut out with a cutting torch and replace the bottom and knuckle with a new steel plate (R. 637-638); that you are cutting out and replacing a portion of the steel bottom of the barge (R. 638); that a knuckle is the corner where the side and the bottom plate meet (R. 638); that the frame and bilge brackets are strength members and structural supports of the barge (R. 638-639); that the frames are structural supports on the bottom of the barge (R. 639); that part of their job was to cut out and replace part of the structural frames (R. 639); that the bilge brackets are structural parts of the knuckle (R. 640); that "fair" means to straighten up while "renew" means to replace entirely (R. 641); that these repairs were structural repairs (R. 642); that they had electric welding and acetylene cutting equipment and winch truck or crane to handle the material with at Platzer (R. 642); *that a winch truck or crane is necessary because the steel plate is too big for men to lift* (R. 643); *that to do this work shown on Plaintiff's Exhibit #19 it was necessary to remove the barge from the water and place it in drydock* (R. 643); *that you just couldn't make the repairs in the water* (R. 643); *that they were working on the bottom part of the rake and you had to get it out of the water to do this* (R. 643); *that it would require someone with knowledge of welding, burning and fitting* (R. 644); that to his knowledge there was no one from

Union Barge around supervising any of this repair operation (R. 645); that the structural changes involved on this repair contract just had to do with the damages it had received (R. 651); *that he considered this major repair because he did not believe the barge could be used in this damaged condition* (R. 658).

ARGUMENT

1. Jurisdiction

The burden was upon the petitioner to allege and prove a cause of action within the jurisdiction of the Federal District Court. In this case the petitioner alleged that this was a cause of admiralty and maritime jurisdiction under Rule 9(h).

The Constitution provides that the federal judicial power shall extend to "all cases of admiralty and maritime jurisdiction"[6] but it has been left to Congress and to the Courts to define that phrase. Section 9 of the Judiciary Act of 1789[7] provides that the district courts of the United States shall have original jurisdiction of "any civil case of admiralty or martime jurisdiction."

This Court first enunciated the rule as to admiralty jurisdiction of the federal courts in matters of tort in *The Plymouth*[8] when it stated:

> ". . . The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas, or

6. U. S. Constitution, Art. III, §2.

7. 1 Stat. 76, as amended, 28 U.S.C. §1333.

8. 70 U.S. (3 Wall.) 20, 18 L.Ed. 125 (1866).

> navigable waters where it occurred. Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance."[9]

This rule was reiterated in *Atlantic Transport Co. of West Virginia v. Imbrovek,*[10] where the Supreme Court held that the jurisdiction of the admiralty in torts is indispensably, if not exclusively, dependent upon the locality of the tort. And in *Grant Smith-Porter Ship Company v. Rohde,*[11] the Court announced:

> "The general doctrine that in contract matters admiralty jurisdiction depends upon the nature of the transaction and in tort matters upon the locality, has been so frequently asserted by this court that it must now be treated as settled."[12]

And in construing the locality of the tort, it is not the place where the negligent acts occur but rather where the injury occurs.

Applying these well-established principles of law to the facts of our case here, it is obvious that the district court lacked admiralty or maritime jurisdiction of this case because the locality of the tort here was on land and not on navigable waters. Delome was injured when he tripped and fell near the front end of the barge UBL 550 which was drawn upon a marine railway and located some 240 feet from water's edge. Even the Extension of Ad-

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9. Ibid at 128.

10. 234 U.S. 52, 58 L.Ed. 1208, 34 S.Ct. 733 (1914).

11. 257 U.S. 469, 66 L.Ed. 321, 42 S.Ct. 157 (1922).

12. Ibid at 476.

miralty Jurisdiction Act of 1948[13] does not create jurisdiction in this case because it provides:

> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, *caused by a vessel on navigable water,* notwithstanding that such damage or injury be done or consummated on land." (Emphasis supplied).

In this case the undisputed evidence was that not only the front end of the barge where the plaintiff was working when he was injured was on land, but *the entire barge was on dry land—in fact, the rear of the barge was some 65 feet from the nearest water* (R. 636-637), as even the petitioner concedes (Petition for Certiorari, p. 6).

It should be further noted that admiralty jurisdiction has not been construed to extend to accidents on piers, jetties, bridges, or even ramps or railways running into the sea.[14]

Therefore, since Delome's injury here neither occurred on navigable water nor was it caused by a vessel on navigable water, applying the indispensable requirement of locality of the tort, there is no admiralty or maritime jurisdiction in this case, and the Fifth Circuit properly reversed the judgment of the District Court for lack of jurisdiction and remanded the cause with directions that it be dismissed without prejudice.

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13. 62 Stat. 496, 46 U.S.C. §740.

14. *Rodrigue v. Aetna Casualty & Surety Company,* 395 U.S. 352, 23 L.Ed.2d 360, 89 S.Ct. 1835 (1969); *Hastings v. Mann,* 4th Cir. 1965, 340 F.2d 910, cert. den. 380 U.S. 963, 14 L.Ed.2d 153, 85 S.Ct. 1106.

2. Unseaworthiness

Union Barge only owed a duty of seaworthiness to the petitioner, Delome, if (1) the barge were in navigation at the time of Delome's accident, and (2) Delome was performing the traditional duties of a seaman. The Court of Appeals correctly held that the members of Delome's crew were not doing the type of work traditionally performed by seamen, and therefore no warranty of seaworthiness was owed to Delome by Union Barge. In addition, though the courts below held otherwise, the barge UBL 550 was clearly not in navigation at the time of Delome's accident.

The best that can be said of the status of Delome here is that from time to time he worked aboard vessels brought into Platzer Shipyard for repairs. There was no evidence that at the time of his accident he was performing the traditional duties of a seaman, and therefore no warranty of seaworthiness was owed to him. As shown by the evidence summarized above, Delome's crew was engaged in repairing damage done to the forward rake of the barge UBL 550 which prevented it from being used in navigation. Delome himself admitted that he was employed to burn, cut and fit a steel plate which was six to eight feet wide and ten to fifteen feet long and was so heavy that it required the use of a winch truck owned by Platzer Shipyard to lift it (R. 243-246). The work was such that the repairs could not be made in the water but rather it was necessary to remove the barge from the water and place it in drydock (R. 643), and it required someone with knowledge of welding, burning and fitting (R. 644). Even Capt. John Vandergrift, the petitioner's "expert witness", admitted that the plates and knuckles could not be taken out and replaced with the barge in

the water (R. 419) and that the crew of a tug does not have welding torches, cutting torches, winches, and that sort of thing to make major repairs or repairs of almost any extent (R. 420).

Therefore, the Court of Appeals was correct when it observed:

> ". . . While the barge was not out of navigation, its flotation capability was, at least, impaired during the repair process. Moreover, cutting a large, heavy plate out of the forward rake and inserting a new one required special equipment, including a winch truck and crane, not normally categorized as appurtenant to the vessel. Finally, whatever Delome's particular function may have been, his crew was engaged in a specialized task demanding training and skills not customarily found among seamen. To summarize, the repairs undertaken were not such as could have been performed in the ordinary course of business in the shipping industry. They could have been accomplished only on a drydocked vessel, with special equipment, and by a trained crew of shipfitters, not seamen. . . ."[15]

Contrary to petitioner's contention that the Court's opinion in this case "flies smack in the face of *Sieracki*,"[16] it should be noted that the petitioner here was *not* a longshoreman but was a shorebased shipyard worker (a distinction of considerable importance) and the Fifth Circuit in this case was clearly following the precedent first established by this Court in *United N. Y. & N. J. Sandy Hook Pilots Ass'n v. Halecki*,[17] a case which petitioner pointedly

15. 444 F.2d 225, 232.

16. Petition for Certiorari, p. 11.

17. 358 U.S. 613, 3 L.Ed.2d 541, 79 S.Ct. 517 (1959).

ignores in his petition. Further, though the Fifth Circuit has adopted this same line of reasoning in similar cases involving shorebased workers, e.g., *Drake v. E. I. duPont de Nemours & Co.*,[18] and *Johnson v. Oil Transport Company*,[19] it has also been consistent with the decisions of the Fourth Circuit in *McCown v. Humble Oil & Refining Company*,[20] and the Second Circuit in *Lyon v. United States*.[21] In the *Lyon* case, the district court found that a shipfitter who was injured when he slipped and fell while working aboard a ship undergoing repairs and alterations was not entitled to the warranty of seaworthiness because "his occupation was not that of a seaman either in fact or in judicial theory." This holding was affirmed by the Second Circuit Court of Appeals in a *per curiam* opinion where it noted:

> "The District Court rightly held that the libelant, an employee of the impleaded contractor, was entitled to no warranty of seaworthiness. He was engaged in a type of work not 'traditionally done by seamen.' United New York and New Jersey Sandy Hook Pilots Ass'n v. Halecki, 79 S.Ct. 517, 519."[22]

And petitioner's argument that ship repairmen now "use modern equipment of the type that was not available to the seamen who formerly performed this work"[23] is the same argument that was urged and rejected in *McCown*

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18. 432 F.2d 276 (1970).
19. 440 F.2d 109 (1971).
20. 405 F.2d 596 (1969).
21. 265 F.2d 219 (1959).
22. Ibid at 220.
23. Petition for Certiorari, p. 13.

v. Humble Oil & Refining Company, supra,—under the evidence in this case the work was such that the repairs could not be made in the water but rather it was necessary to remove the barge from the water and place it in drydock (R. 643), and it required someone with special skills and knowledge of welding, burning and fitting (R. 644), and special equipment, including welding torches, cutting torches and winch trucks that were not connected with a tug or barge's seagoing operations (R. 420).

Therefore, it is submitted that the petitioner here, who was working as a shipfitter for Platzer Shipyard doing extensive repairs to the damaged bottom and forward rake of the barge UBL 550, which required that it be taken completely out of the water and drydocked, was not doing work traditionally done by seamen, and therefore no warranty of seaworthiness was owed to him.

There is still another reason why the warranty of seaworthiness was not owed to Delome by Union Barge: the barge UBL 550 had been temporarily withdrawn from navigation.

The uncontradicted testimony in this case established that the barge UBL was an unmanned, unpowered barge primarily motivated by a tug either pushing or pulling the barge (R. 598-599; 406-407; 412); that the barge had been drawn up completely out of the water on a marine railway and was entirely on land (R. 241; 636-637); that the shipyard day crew had cut out the bottom of the barge and cut out a knuckle, so that there was a hole in the bottom of the rake and also where the knuckle was out (R. 157-158); that the openings were large enough to be used for ingress and egress by the men as they worked

(R. 160; 251-252); that with these holes in the bottom of the barge, it would have sunk if it had been in the water (R. 252); that part of the work of the shipyard crew was to cut down a steel plate to fit the rake of the barge, and that the steel plate was so large (six to eight feet wide and ten to fifteen feet long) and so heavy that it required the use of a winch truck owned by Platzer Shipyard to pull it up there (R. 246); and that the crew of a tug could not replace the knuckles or do underwater repairs to the bottom of the barge (R. 420; 643-644). Further, it was undisputed that complete care, custody and control of the barge had been turned over to Platzer Shipyard and there were no representatives, officials or employees of Union Barge at Platzer Shipyard while the barge was undergoing the repair work (R. 591-592; 602; 645).

The leading case on this point is *West v. United States.*[24] There the Supreme Court held that a shipowner owed no duty of seaworthiness to a shipyard employee who was injured while repairing a ship where the vessel involved had been turned over to an independent contractor for repairs to make her seaworthy, equivalent to home port structural repairs, and the ship was not in the hands and under the control of the shipowner at the time of the plaintiff's accident.

The principles enunciated in the *West* case have been followed by the various Circuit Courts in *Union Carbide Corp. v. Goett*,[25] *Van Horn v. Gulf Atlantic Towing Corp.*,[26] and in two very recent cases almost identical on

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24. 361 U.S. 118, 4 L.Ed.2d 161, 80 S.Ct. 189 (1959).

25. 256 F.2d 449, 278 F.2d 319, cert. den. 364 U.S. 826, 5 L.Ed. 2d 55, 81 S.Ct. 64 (1960).

26. 388 F.2d 636 (4th Cir. 1968).

their facts to the instant case: *Moye v. Sioux City & New Orleans Barge Lines, Inc.*,[27] and *Parker v. Cargill.*[28]

In *Moye* the plaintiff was a shipyard worker who sought damages against the owner of a grain barge for injuries sustained in the course of his employment aboard the barge while it was undergoing repairs in Saucer's floating drydock. The barge was unmanned and had no motive power or lights, just as in the barge in the instant case. As a result of two collisions, the barge was in need of repairs to the side and deck plates, as well as to some plates in the hopper, but the repairs were not major repairs or structural changes, and only took several days to complete. After the barge had been delivered to Saucer Shipyard, the bargeowner had no employees or representatives present at the shipyard, just as in our case here. The plaintiff was injured about 10:00 P.M. when he fell through a partially open hatch cover into the hopper, due in part to inadequate illumination. In affirming the district court's finding that there was no warranty of seaworthiness owed by the bargeowner to the shipyard employee, the Fifth Circuit observed:

> "In this case there were no major repairs or structural changes made in the barge although the collision damage required the renewal of side plating in two places, the renewal of some deck plating and the reworking of Nos. 4 and 5 roller hatch covers. This work required the barge to be drydocked by Saucer who, from the time it received the barge until the work was completed, had exclusive control of the

27. 402 F.2d 238 (5th Cir. 1968), cert. den. 395 U.S. 913, 23 L.Ed.2d 226, 89 S.Ct. 1759.

28. 417 F.2d 772 (5th Cir. 1969), cert. den. 397 U.S. 973, 25 L.Ed.2d 267, 90 S.Ct. 1089.

> barge and the lighting under which the repairs were effected. The barge was designed to carry no motive power, lights or crew. Sioux City had no representative or crew aboard at any time while the barge was in Saucer's yard. Under these circumstances we hold that there was no warranty of seaworthiness by the ship owner running in favor of shore-based workers on the vessel."[29]

One year later, in *Parker v. Cargill, supra,* the Fifth Circuit was confronted with an identical fact situation—a shipyard worker who was injured while working aboard an unmanned barge undergoing repairs on a floating drydock on navigable water in the Mississippi River with the shipyard having exclusive custody and control of the barge and the repairs. The Fifth Circuit, in affirming the judgment of the trial court without even bothering to hear oral argument, wrote a *per curiam* opinion holding that the case was indistinguishable from *Moye v. Sioux City, supra,* and that no warranty of seaworthiness was owed to the plaintiff because the barge was temporarily withdrawn from navigation.

Since the facts of our case are indistinguishable from the *Moye* and *Parker* cases, it is submitted that Union Barge owed no duty or warranty of seaworthiness to Delome because the barge UBL 550 had been temporarily withdrawn from navigation at the time of Delome's accident.

3. Negligence

Although the Court of Appeals correctly reversed the trial court's findings on negligence against Union Barge

29. 402 F.2d 238, 240.

for lack of admiralty or maritime jurisdiction, the findings of negligence against Union Barge could not stand in any event. The trial court in this case found that Union Barge was negligent in failing to provide Delome with a reasonably safe place to work, to-wit: with an adequate hatch coaming of sufficient height and with a walkway unobstructed by brackets, timberheads and raised pumpwell cover, and that such negligence was a proximate cause of Delome's injuries and damages. However, since Union Barge had turned over complete custody and control of the barge UBL 550 to Platzer for repairs, and exercised no direction or supervision over the repair work, and since Delome was injured because he was partially blinded by a shipyard light positioned onshore and tripped over an unknown object while walking down the walkway on the portside of the barge, it seems clear that Union Barge breached no duty of care toward Delome.

As the Court of Appeals observed in *Moye v. Sioux City & New Orleans Barge Lines, Inc., supra:*

> "Upon the complete surrender of control of the barge by Sioux City to Saucer for repairs, there was no duty owed by Sioux City to protect Moye from risks inherent in carrying out the contract. Therefore Moye's claim of negligence in failing to provide him with a safe place to work must also fail. West v. United States, supra."[30]

In *West v. United States,* this Court held that a shipowner owed no duty to exercise reasonable care to furnish a safe place to work where the shipowner had no control over the vessel, or power either to supervise or control

30. 402 F.2d 238, 241.

the repair work in which the injured shipyard employee was engaged.

The only possible exception to this rule would be for a hidden or latent defect, which might make the shipowner guilty of negligence even though he had no control of the repairs. However, this exception is not applicable here because neither the hatch coaming nor the walkway were hidden or latent. In fact, Delome was fully aware of both the size of the hatch coaming and the walkway since he readily identified the photographs (Plaintiff's Exhibit Nos. 1-4, Record Exhibit Volume 3-5) as representing the same type of walkway and hatch coaming *as he remembered it* that was on the barge that day that he fell into the hold (R. 109-110); that he estimated the hatch coaming to be about 18 inches in height (R. 127, 258); and he knew the walkway was about 18 to 20 inches wide (R. 171, 272). Therefore, the nature, size and condition of the hatch coaming and walkway were not hidden or latent insofar as Delome was concerned.

Thus, it seems clear that Delome was not injured as a result of any negligence or breach of duty owed to him by Union Barge but rather his injury occurred as a result of his own negligence (as the trial court found), coupled with an unsafe condition or risk created by the repair work being performed by Platzer.

CONCLUSION

There are no special and important reasons for granting writ of certiorari in this case. The opinion of the Court below on the question of admiralty jurisdiction in matters of tort is harmonious and in no way in conflict with this Court's decisions from the time of *The Plymouth* to the present time. Likewise, the opinion of the Court below

on the question of whether the petitioner, a shorebased shipyard worker, was performing the traditional work of a seaman so as to be entitled to the warranty of seaworthiness is consistent with this Court's opinion in *Halecki* and its progeny. Further, this case is not significant beyond the parties and was correctly decided below under the particular facts and evidence presented on the trial of this case.

Respondent, Platzer Shipyard, Inc., therefore prays that the Petition for Certiorari be in all things denied.

Respectfully submitted,

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By_____
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Of Counsel.

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Reply to Petition for Writ of Certiorari have been furnished to the attorneys for the Petitioner and the attorneys for the Respondent, Union Barge Line Company, on this 26th day of October, 1971.

_____
DEWEY J. GONSOULIN

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 31037

C. J. PAUL DELOME, Plaintiff-Appellee,

versus

UNION BARGE LINE COMPANY, ET AL., Defendants-Third Party Plaintiffs-Appellants-Cross Appellee,

versus

PLATZER SHIPYARD, INC., Third Party Defendant-Appellee-Cross Appellant.

Appeal from the United States District Court for the Eastern District of Texas

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(June 8, 1971)

Before O'SULLIVAN,* THORNBERRY and DYER, Circuit Judges.

DYER, Circuit Judge: Union Barge Line Company and Platzer Shipyard, Inc., appeal from the District Court's judgment for Delome, a shipfitter injured on the Barge

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* Senior Circuit Judge, 6th Circuit, sitting by designation.

UBL 550 while it rested on a marine railway. Appellants contend that the trial court had no admiralty and maritime jurisdiction over this controversy, that the court's conclusions concerning the unseaworthiness of the barge and the negligence of Union were erroneous, and that the damages assessed were excessive. We vacate with directions.

An open-hopper cargo barge, the UBL 550 had no motive power and carried no crew. On its port and starboard decks were walkways twenty inches wide. Coamings 3 5/16 inches high separated these walkways from the open cargo hatch. On the port side of the vessel, brackets extended into the walkway from the hatch coaming. Bitts (commonly known as timberheads) approximately nine inches high, as well as a circular pumpwell cover, were located in the same walkway.

On July 22, 1966, the UBL 550 was delivered to Platzer's repair facility in Green Bayou, Texas, for repairs to its forward rake area. Two days later the barge was placed on a marine railway and moved out of the water so that workmen could take a damaged plate from the forward rake and reseal the opening. During the evening shift on July 25, a foreman ordered Delome, one of the workers, to go onto the barge and enter the forward rake space through a hatchway. To facilitate ingress and egress, Platzer had placed a ladder twenty feet from the forward bulkhead on the port side. Employees such as Delome used this ladder to climb aboard.

Following his instructions, Delome reached the port walkway. As he started forward, he was temporarily blinded by the glare of a 1000-watt onshore light located on a pole near the vessel's bow. After taking a few steps in this dazzled condition, Delome fell ten feet into the open cargo hold.

Delome collected under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §§ 901-950, then initiated this action against Union Barge Line Co. pursuant to Rule 9(h) of the Federal Rules of Civil Procedure.[1] Subsequently Union impleaded Platzer—the third party complaint alleging that Platzer's negligence and breach of its duty of workmanlike performance proximately caused Delome's injury. According to the record, no party objected to the District Court's assumption of admiralty jurisdiction.

Sitting without a jury, the District Judge heard the evidence and concluded that, at the time of Delome's accident, the UBL 550 was a vessel in navigation; that Union owed a warranty of seaworthiness to Delome because he "was performing the traditional duties of a seaman in making minor repairs as a shipfitter;" and that Union had breached this warranty by providing an unseaworthy walkway, filled with trip hazards which circumscribed a hatch coaming insufficient in height. The court held that these breaches were causally related to Delome's fall. Furthermore, the court decided that Union was negligent in furnishing Delome with an unsafe place to work; it held that such negligence was a proximate cause of Delome's injuries. The court also determined that Platzer was negligent in failing to install a guard rail around the open

1. Rule 9 provides in pertinent part:

(h) Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for these purposes whether so identified or not.

hopper cargo area and in positioning its onshore light. Concluding that Platzer's negligence proximately caused Delome's injuries and constituted a breach of the duty of workmanlike performance owed to Union, the District Court held that Platzer was obligated to indemnify Union for all sums recovered by Delome as a result of the accident. Finally, the court found Delome 5% contributorily negligent and diminished his recovery by that percentage. It awarded damages of $213,437.69 together with interest at 6% per annum.

Both Union and Platzer have appealed. They question the District Court's assumption of admiralty jurisdiction and attack the court's conclusions with respect to the warranty of seaworthiness and duty to provide a safe place to work. They also assert that the damages assessed by the court were excessive.

ADMIRALTY JURISDICTION

A. *The Navigable Waters Test*

When Delome fell, the UBL 550 was located on a marine railway. Its stern was approximately sixty-five feet inland. In fact, no part of the barge was on, or even over, navigable water. Consequently the Admiralty Extension Act[2] is inapplicable.

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2. 46 U.S.C.A. § 740. The Extension Act provides in pertinent part:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.
>
> In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water. . . .

Postulating that breach of the warranty of seaworthiness is a maritime tort, Union and Platzer argue that Delome's "unseaworthiness" claim was not within the District Court's "admiralty and maritime jurisdiction" as articulated by the Constitution,[3] and defined by Congress[4] and the federal courts.[5] The vessel, the accident, and the injury were too remote from the water's edge, the traditional boundary of admiralty tort jurisdiction. Thus framed, the issue is simple, if somewhat wordy: whether the shoreward sweep of the silver oar encompasses a shipyard worker's suit against a vessel owner when the complaint alleges that the worker is a *Sieracki*[6] seaman injured because of the

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3. U. S. Const. art. III, § 2.

4. *E.g.*, Jones Act, 46 U.S.C.A. § 688; Admiralty Extension Act, 46 U.S.C.A. § 740. Ostensibly there are limits to the congressional power. *See, e.g., O'Donnell v. Great Lakes Dredge & Dock Co.*, 1943, 318 U.S. 36, 42-43; *The Blackheath*, 1904, 195 U.S. 361, 368-69 (Brown, J., concurring); *The Lottawanna*, 1874, 88 U.S. (21 Wall.) 558, 577; *The Belfast*, 1868, 74 U.S. (7 Wall.) 624, 640-41; *Gebhard v. S.S. Hawaiian Legislator*, 9 Cir. 1970, 425 F.2d 1303, 1316 (Wright, J., dissenting in part). *See also* Black, "Admiralty Jurisdiction: Critique and Suggestions," 50 *Colum. L. Rev.* 259 (1950); Maraist, "Proposed Discipline for a Procedural Problem Child: Reallocation of Admiralty Tort and Compensation Jurisdiction Between Federal and State Courts," 24 *U. Miami L. Rev.* 26 (1969); Morrison, "The Remedial Powers of the Admiralty," 43 *Yale L.J.* 1 (1933); Tetreault, "Seamen, Seaworthiness, and the Rights of Harbor Workers," 39 *Cornell L.Q.*, 381 (1954).

5. Judicial applications of the rules delineated by *The Plymouth*, 1865, 70 U.S. (3 Wall.) 20, 35-36, *The Osceola*, 1903, 189 U.S. 158, 171, 175, and their progeny have evoked perceptive critical comment in a number of publications. *E.g.*, Tetreault, "Seamen, Seaworthiness, and the Rights of Harbor Workers," 39 *Cornell L.Q.* 381 (1954); Note, "Risk Distribution and Seaworthiness," 75 *Yale L.J.* 1174 (1966); Comment, "Seamen and the Warranty of Seaworthiness in Maritime Injuries—Sieracki Today," 34 *Tulane L.Rev.* 572 (1960); Comment, "A New Look at the Unseaworthiness Doctrine: The *Roper* Case," 29 *U.Chi. L.Rev.* 519 (1962).

6. *Seas Shipping Co. v. Sieracki*, 1946, 328 U.S. 85.

vessel's unseaworthiness, if the vessel is located on a marine railway outside navigable water.

Born of dicta[7] and nurtured by fiction,[8] the shipowner's warranty of seaworthiness in personal injury cases is now firmly rooted in federal maritime law.[9] For years this warranty was considered contractual in nature. *E. g., The Osceola*, 1903, 189 U.S. 158, 171-75; *Hamilton v. United States*, 4 Cir. 1920, 268 Fed. 15, 21, *cert. denied*, 254 U.S. 645; *Rainey v. New York & P. S.S. Co.*, 9 Cir. 1914, 216 Fed. 449, 453, *cert. denied*, 235 U.S. 704; *see Seas Shipping Co. v. Sieracki*, 1946, 328 U.S. 85, 90. Recently, however, some courts have articulated the thesis that breach of the warranty is tortious. *E.g., Gebhard v. S.S. Hawaiian Legislator*, 9 Cir. 1970, 425 F.2d 1303, 1310; *Strika v. Netherlands Ministry of Traffic*, 2 Cir. 1950, 185 F.2d 555, 558, *cert. denied*, 1951, 341 U.S. 904; *The Chiswick*, 5 Cir. 1916, 231 Fed. 452, *cert. denied*, 241 U.S. 673; *see Gutierrez v. Waterman Steamship Corp.*, 1963, 373 U.S. 206, 214-15. Nevertheless, given their factual contexts, the latter expressions must be regarded as dicta: in each case the vessel was moored on navigable waters and the causes were, at least, within the purview of the Extension Act. *See, e.g., Strika v. Netherlands Ministry of Traffic, supra* at 556. Indeed, we have found no case in which a definition of the intrinsic nature of the

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7. *The Osceola*, 1903, 189 U.S. 158, 175; *see United New York & New Jersey Sandy Hook Pilots Association v. Halecki*, 1959, 358 U.S. 613, 616.

8. *Latus v. United States*, 2 Cir. 1960, 277 F.2d 264, 267, *cert. denied*, 364 U.S. 827. *See also* Tetreault, "Seamen, Seaworthiness, and the Rights of Harbor Workers," 39 *Cornell L.Q.* 381 (1954).

9. *See generally* Bue, "Admiralty Law in the Fifth Circuit—A Compendium for Practitioners: I," 4 *Hous. L.Rev.* 350, 392-408 (1966) (pre-1966 judicial development).

warranty of seaworthiness was necessary for determination of a federal court's admiralty jurisdiction.

The warranty of seaworthiness in personal injury cases essentially depends on neither common-law tort nor contract concepts. *Dimas v. Lehigh Valley R.R.*, 2 Cir. 1956, 234 F.2d 151, 153. Instead, while the seaworthiness doctrine is comprised of both tort and contract elements, it is a creature of twentieth-century judicial policy concerning risk distribution in the shipping industry. In *Seas Shipping Co. v. Sieracki, supra,* the Supreme Court explicated this basis for the doctrine. It stated:

> Obviously the norm of the liability has been historically and still is the case of the seaman under contract with the vessel's owner. This is because the work of maritime service has been done largely by such persons. . . .
>
> . . .
>
> Because rationalizing the liability as one attached by law to the relation of shipowner and seaman, where this results from contract, may have been thought useful to negative the importation of those common-law tort limitations does not mean, however, that the liability is itself contractual or that it may not extend to situations where the ship's work is done by others not in such an immediate relation of employment to the owner. That the liability may not be either so founded or so limited would seem indicated by the stress the cases uniformly place on its relation, both in character and in scope, to the hazards of marine service which unseaworthiness places on the men who perform it. . . . Those risks are avoidable by the owner to the extent that they may result from negligence. And beyond this he is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost.

> These and other considerations arising from the hazards which maritime service places upon the men who perform it, rather than any consensual basis of responsibility, have been the paramount influences dictating the shipowner's liability for unseaworthiness as well as its absolute character. It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character . . . it is a form of absolute duty owing to all within the range of its humanitarian policy.

328 U.S. at 90-95 (footnotes omitted) (citations omitted). This warranty does not apply solely to vessels plying their trade on the high seas; it does not necessarily terminate, or become suspended, when ships reach calm waters or safe harbors. The warranty contemplates not only the turbulence of the oceans but also the conditions peculiar to ships, where space and equipment must be utilized carefully to minimize accident-inducing hazards. While the vessel owner's warranty does not mean that he has eradicated all risks or that his ship can weather all storms, it does indicate that the vessel is reasonably fit for the intended use. *See Boudoin v. Lykes Brothers Steamship Co.*, 1955, 348 U.S. 336, 339. It is both absolute and nondelegable. *United New York & New Jersey Sandy Hook Pilots Association v. Halecki,* 1959, 358 U.S. 613, 616-17; *see Carlisle Packing Co. v. Sandanger,* 1922, 259 U.S. 255, 259. Recently the Court added:

> A major burden of the Court's decisions spelling out the nature and scope of the cause of action for unseaworthiness has been insistence upon the point that it is a remedy separate from, independent of, and

> additional to other claims against the shipowner, whether created by statute or under general maritime law. More specifically, the Court has repeatedly taken pains to point out that liability based on unseaworthiness is wholly distinct from liability based upon negligence. The reason, of course, is that unseaworthiness is a *condition,* and how that condition came into being—whether by negligence or otherwise—is quite irrelevant to the owner's liability for personal injuries resulting from it.

Usner v. Luckenbach Overseas Corp., 1971, 400 U.S. 494, 498; *see Aguirre v. Citizens Casualty Co.,* 5 Cir. 1971, 441 F.2d 141, 144.

To hold, then, that this uniquely maritime cause of action is circumscribed by the same admiralty jurisdictional boundaries as common-law "land" torts would contravene the risk distribution policy underlying the doctrine as well as common sense. *Cf O'Donnell v. Great Lakes Dredge & Dock Co.,* 1943, 318 U.S. 36, 42-43. In reason and in practice, federal jurisdiction to consider alleged breaches of the shipowner's warranty to furnish a seaworthy vessel cannot depend on such gossamer classification. In another context Mr. Justice Halan has said:

> The confidence of people in their ability to predict the legal consequences of their actions is vitally necessary to facilitate the planning of primary activity and to encourage the settlement of disputes without resort to the courts. However, that confidence is threatened least by the announcement of a new remedial rule to effectuate well-established primary rules of behavior. There is no question in this case of any change in the duties owed by shipowners to those who work aboard their vessels. Shipowners well understand that breach of the duty to provide a seaworthy ship may

> subject them to liability for injury regardless of where it occurs, and for death occurring on the high seas or in the territorial waters of most States. It can hardly be said that shipowners have molded their conduct around the possibility that in a few special circumstances they may escape liability for such a breach. Rather, the established expectations of both those who own ships and those who work on them are that there is a duty to make the ship seaworthy and that a breach of that federally imposed duty will generally provide a basis for recovery. It is the exceptional denial of recovery that disturbs these expectations.

Moragne v. States Marine Lines, Inc., 1970, 398 U.S. 375, 403-04. Justice Harlan's scholarly opinion articulates our thoughts here. That a vessel is drydocked does not necessarily mean that no warranty of seaworthiness is owed. *See, e.g., Johnson v. Oil Transport Co.*, 5 Cir. 1971, 440 F.2d 109, 115 [No. 28418, Mar. 12, 1971]; *Moye v. Sioux City & New Orleans Barge Lines, Inc.*, 5 Cir. 1968, 402 F.2d 238, *cert. denied*, 1969, 395 U.S. 913; *Rogers v. M/V Ralph Bollinger*, E.D. La. 1968, 279 F.Supp. 92, 95; *Allen v. Union Barge Line Corp.*, E.D. La. 1965, 239 F.Supp. 1004, 1008, *aff'd*, 5 Cir. 1966, 361 F.2d 217, *cert. denied*, 1967, 385 U.S. 1006. Nor does the fact that the ship is temporarily out of the water necessarily defeat federal jurisdiction with regard to causes involving possible breaches of the claimed warranty. Instead, as the cases illustrate, the warranty's existence and federal jurisdiction to consider alleged breaches depend on conceptual considerations, such as status, discussed *infra*. The "*in* navigable waters" spatial limitation is not determinative. It follows that any jurisdictional dichotomy between marine railways and other

types of drydocks[10] regarding the warranty of seaworthiness would be a fictional artifice, contrived to ensure conformity to a spatial boundary which is not really pertinent. To abjure federal jurisdiction over this maritime doctrine on the basis of the navigable waters criterion would exemplify "the exceptional denial of recovery that disturbs" the established expectations of both those who own ships and those who work on them. It can hardly be said that shipowners have molded their conduct around the possibility that by placing their vessels on marine railways rather than in some other type of drydock, they may escape liability for breaches of the warranty of seaworthiness. The distinction would be as difficult to sustain rationally as that found wanting in *Moragne*. Consequently we hold that the navigable waters, or locality, test is inapplicable to an unseaworthiness claim demanding damages as a result of personal injuries occurring aboard a vessel on a marine railway.

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10. For purposes of the Longshoremen's and Harbor Workers' Compensation Act, marine railways have been identified as drydocks. *Holland v. Harrison Brothers Dry Dock & Repair Yard, Inc.*, 5 Cir. 1962, 306 F.2d 369, 372-73; *Avondale Marine Ways, Inc. v. Henderson*, 5 Cir. 1953, 201 F.2d 437, 438, *aff'd*, 346 U.S. 366; *Continental Casualty Co. v. Lawson*, 5 Cir. 1933, 64 F.2d 802, 804-05. That the test is functional—coverage under the Act being dependent on the type of work for which the facility was intended—is manifested by the fact that accidents on other types of docks have been considered outside the Act's scope. *See Nacireme Operating Co. v. Johnson*, 1969, 396 U.S. 212, 217 n. 10, 222-23; *Travelers Insurance Co. v. Shea*, 5 Cir. 1967, 382 F.2d 344, 346-47, *cert. denied*, 389 U.S. 1050; *O'Leary v. Puget Sound Bridge & Dry Dock Co.*, 9 Cir. 1965, 349 F.2d 571; *American Mutual Liability Insurance Co. v. Neumann*, S.D. Ala. 1969, 1970 A.M.C. 466. *But See* Note, "Dockside Injuries Under the Longshoremen's and Harbor Workers' Compensation Act," 3 *Ga. L.Rev.* 622 (1969).

B. *The "Status" Touchstone*

To determine whether a warranty of seaworthiness is owed shoreside workers, examination of three status-oriented factors becomes essential. We focus on "the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done, rather than the specific type of work that each of the numerous shore-based workmen is doing on shipboard at the moment of injury." *West v. United States*, 1959, 361 U.S. 118, 122; *accord, Watz v. Zapata Off-Shore Co.*, 5 Cir. 1970, 431 F.2d 100, 108; *Moye v. Sioux City & New Orleans Barge Lines, Inc., supra* at 240.

Concerning the status of the ship, clearly even a dry-docked vessel may be subject to the warranty of seaworthiness if it is in navigation—*i.e.*, "engaged as an instrument of commerce and transportation on navigable waters." *Rogers v. M/V Ralph Bollinger, supra* at 94-95; *see Hilton v. Aegean Steamship Co.*, D. Ore. 1965, 239 F. Supp. 268. After an extensive discussion of this subject, this Court concluded that a precise definition of the phrase "in navigation" is impossible. *Johnson v. Oil Transport Co., supra* at 115. Indeed, the navigational status of the vessel ordinarily remains a question of fact. *Roper v. United States*, 1961, 368 U.S. 20, 22-23. Nevertheless, a vessel which temporarily leaves commerce, enters a shipyard for minor repairs, and thereupon returns to commerce remains in navigation for purposes of the warranty. *See Drake v. E. I. DuPont deNemours & Co.*, 5 Cir. 1970, 432 F.2d 276, 277-78; *Martin v. Jones*, E.D. La. 1968, 296 F. Supp. 878, 881; *Rogers v. M/V Ralph Bollinger, supra; Allen v. Union Barge Line Corp., supra* at 1007; *Hilton v. Aegean Steamship Co., supra.*

Concerning the pattern of repairs, the limiting factor is tradition: it "requires that the injured shorebased worker be engaged in work traditionally that of a seaman. . . . excluding those persons performing such tasks as making major repairs requiring drydocking or special skills." *Atkins v. Greenville Shipbuilding Corp.*, 5 Cir. 1969, 411 F.2d 279, 282, *cert. denied*, 396 U.S. 846; *see Drake v. E. I. DuPont deNemours & Co.*, *supra* at 278. Moreover, "[t]he inquiry is not who best can bear the risk, but whether the repair *project*—not the specific task—is one that 'seamen' historically have performed." *Watz v. Zapata Off-Shore Co.*, *supra*, 431 F.2d at 107.

Concerning the extensive nature of the work contracted to be done, little need be said; for this criterion is intertwined with the "in navigation" requirement discussed previously. Generally "dead" ships, those withdrawn from navigation and undergoing major repairs, are not subject to the warranty of seaworthiness. *West v. United States*, *supra* at 122; *Johnson v. Oil Transport Co.*, *supra* at 112; *Baum v. United States*, 5 Cir. 1970, 427 F.2d 215, 217; *Stark v. United States*, 5 Cir. 1969, 413 F.2d 253; *Van Horn v. Gulf Atlantic Towing Corp.*, 4 Cir. 1968, 388 F.2d 636, 638; *Latus v. United States*, 2 Cir. 1960, 277 F.2d 264, 266, *cert. denied*, 364 U.S. 827; *Union Carbide Corp. v. Goett*, 4 Cir. 1958, 256 F.2d 449, 455, *rev'd on other grounds*, 1959, 361 U.S. 340; *Guenard v. United States*, E.D. La. 1968, 278 F.2d 310. Conversely, as noted earlier, vessels undergoing minor repairs remain subject to the warranty.

Applying these variables in the factual context *sub judice*, it is clear that the UBL 550 was a vessel in navigation undergoing minor repairs at the time of Delome's

injury. The barge remained at the shipyard for seven days, of which three were spent in making repairs costing only $3688.76. However, it is equally clear that the members of Delome's crew were not doing the type of work traditionally performed by seamen. The record discloses that the UBL 550 entered Platzer's shipyard for minor structural repairs which necessitated drydocking the vessel. While the barge was not out of navigation, its flotation capability was, at least, impaired during the repair process. Moreover, cutting a large, heavy plate out of the forward rake and inserting a new one required special equipment, including a winch truck and crane, not normally categorized as appurtenant to the vessel. Finally, whatever Delome's particular function may have been, his crew was engaged in a specialized task demanding training and skills not customarily found among seamen. To summarize, the repairs undertaken were not such as could have been performed in the ordinary course of business in the shipping industry: They could have been accomplished only on a drydocked vessel, with special equipment, and by a trained crew of shipfitters, not seamen. Manifestly, then, the District Court's finding with respect to the type of work in which Delome and the other members of his crew were engaged was clearly erroneous. Therefore, Union owed Delome no warranty of seaworthiness since he was not even a *Sieracki* or *Hawn*[11] "seaman."

Neither the navigable waters criterion nor the Extension Act encompasses Delome's negligence claim against Union. Certainly our disapprobation of the navigable waters limitation in unseaworthiness cases does not preclude its application in a common-law tort action. *See, e.g., Watz v. Zapata Off-Shore Co., supra* at 110. As we have said,

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11. Pope & Talbot, Inc. v. Hawn, 1953, 346 U.S. 406.

Union owed Delome no warranty of seaworthiness. Furthermore, undisputably the UBL 550 was inland, removed from navigable waters, at the time of Delome's accident. Consequently the District Court had no admiralty jurisdiction over the common-law negligence claim.

DIVERSITY JURISDICTION

Delome invoked, and the District Court assumed, admiralty jurisdiction under Rule 9(h) of the Federal Rules of Civil Procedure. Although we have held that the court had no admiralty jurisdiction, the court might have considered the negligence allegations—that Union had failed to provide Delome's crew with a reasonably safe place to work—under diversity principles. *See* 28 U.S.C.A. §1332. To determine whether such jurisdiction exists, we have reviewed Delome's complaint, as well as relevant portions of the trial transcript.

After averring that the case was within the admiralty and maritime jurisdiction, Delome noted in his complaint that he "is a resident of Orange County, Texas." Furthermore, he alleged:

> Defendant Union Barge Line Company is a foreign corporation or foreign business organization and the address of its home office is Dravo Bldg., 5th and Liberty Streets, Pittsburg 22, Pennsylvania; such Defendant does business in the State of Texas from time to time and the cause of action asserted herein arose in the State of Texas; that such Defendant does not maintain a regular office in the State of Texas nor has it designated an agent for service of process and therefore its agent for service of process is the Secretary of State of the State of Texas under the provisions of Article 2031-b of the Texas Civil Statutes.

Examination of the complaint reveals two facts: First, Delome stated these allegations to obtain service of process under article 2031b, a long-arm statute, rather than to show diversity of citizenship. Second, Delome's allegations are insufficient to confer federal jurisdiction under 28 U.S.C.A. § 1332. Standing alone, an allegation that a party is a resident of a certain state is not a sufficient allegation of his citizenship in that state. *Pattiz v. Schwartz,* 8 Cir. 1968, 386 F.2d 300, 301; *CORE v. Clemmons,* 5 Cir. 1963, 323 F.2d 54, 58, *cert. denied,* 1964, 375 U.S. 992; *Texaco-Cities Service Pipe Line Co. v. Aetna Casualty & Surety Co.,* 8 Cir. 1960, 283 F.2d 144, 145; *Gorman v. King,* E.D. Wis. 1970, 50 F.R.D. 195, 197. *See generally* 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1208 (1969). Moreover, an allegation that a corporation's home office is located in a certain state is not equivalent to a declaration that its principal place of business is situated in that state. *See, e.g., Anniston Soil Pipe Co. v. Central Foundry Co.,* N.D. Ala. 1963, 216 F. Supp. 473, *aff'd,* 5 Cir. 1964, 329 F.2d 313. *See also* 28 U.S.C.A. § 1332(c).

We have discerned nothing in the remainder of the record to cure these defects. *See, e.g., DeVries v. Starr,* 10 Cir. 1968, 393 F.2d 9, 11. Consequently, the admiralty jurisdictional underpinning having been removed, and no diversity jurisdiction appearing, this Court cannot now consider Delome's substantive negligence claim.

The judgment of the District Court is vacated for lack of jurisdiction and the cause is remanded with directions that it be dismissed without prejudice.

VACATED and REMANDED with Directions.

ON PETITION FOR REHEARING
AND
PETITION FOR REHEARING EN BANC

PER CURIAM:

The Petition for Rehearing is denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is denied.